(2)

No. 04-417

FILED
DEC 17 2004

In The

Supreme Court of the United States

BILL HEARD CHEVROLET, INC. – PLANT CITY,

Petitioner,

v.

RANDAL S. BRAGG, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

J. DANIEL CLARK
CLARK, CHARLTON & MARTINO, P.A.
3407 W. Kennedy Boulevard
Tampa, FL 33609
(813) 879-0700

KEITH EDWARD HOPE
(*Counsel of Record*)
THE HOPE LAW FIRM, P.A.
5614 Guava Street
Holmes Beach, FL 34217
(941) 779-0988

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The Truth in Lending Act ("TILA") and Treasury Regulation Z require a creditor to make disclosures to a consumer *before* credit is extended, *i.e.*, before a *consumer* "consummates" a credit transaction so that the consumer can be informed and compare competing offers of credit from creditors. Federal Reserve Board commentary provides that state law should govern when a consumer becomes contractually obligated to a credit transaction. The question presented is:

Whether under TILA and Florida law, a creditor must comply with the TILA disclosure requirements prior to the time the consumer signs the contract, where the contract is unconditional on its face, states that any changes must be in writing, and that the creditor must sign such changes, and where the creditor did not sign certain other documents purporting to create a credit transaction conditional on the creditor's ability to later assign the contract to a third-party lender.

LIST OF PARTIES TO THE PROCEEDINGS

The Respondents, who were plaintiffs/appellants below, are Randal S. Bragg, Robert I. Crabtree, Christopher E. Nichols, Bond Nichols, Andre E. Reichert, Nonie Stebbins, Donald E. Stebbins and John E. Cone. The Petitioner is Bill Heard Chevrolet-Plant City whose parent corporation is Bill Heard Enterprises. Other defendants in the district court were Affiliated Financial Corporation, Triad Financial Corporation, and WFS Financial Incorporated.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES TO THE PROCEEDINGS	ii
INTRODUCTION	1
STATEMENT	2
A. The Facts	2
B. The Proceedings Below	6
REASONS FOR DENYING THE WRIT	9
I. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *FORD MOTOR CREDIT CO. v. MILHOLLIN*	9
II. THERE IS NO SPLIT OF AUTHORITY AMONG THE CIRUITS ON THE QUESTION PRESENTED	11
III. THE DECISION BELOW IS CORRECT	13
CONCLUSION	17

TABLE OF AUTHORITIES

Page

CASES

Clayton v. Howard Johnson Franchise Systems, Inc., 954 F.2d 645 (11th Cir. 1992) 15

Compton v. Alta Vista Motors, Inc., 121 F. Supp.2d 932 (W.D. Va. 2000) 12

Daenzer v. Wayland Ford, Inc., 2002 WL 1050209 (W.D. Mich. May 7, 2002) 13

Davis v. Werne, 673 F.2d 866 (5th Cir. 1982) 12

Dryden v. Lou Budke's Arrow Finance Co., 630 F. 641 (8th Cir. 1980) 12

Ford Motor Credit Company v. Milhollin, 444 U.S. 555 (1980) 1, 9, 10, 11, 13

Gorman v. Kelly, 658 So. 2d 1049 (Fla. 4th DCA 1995) 16

Lambert v. The Berkley South Condominium Ass'n, 680 So. 2d 588 (Fla. 4th DCA 1996) 16

Lozada v. Dale Baker Oldsmobile, Inc., 91 F. Supp.2d 1087 (W.D. Mich. 2000) 12

Maccaferri Gabions, Inc. v. Dynateria Inc., 91 F. 3d 1431 (11th Cir. 1996) 16

Martinez v. Rick Case Cars, Inc., 278 F. Supp.2d 1371 (S.D. Fla. 2003) 12

Nigh v. Koons Buick Pontiac, GMC, Inc., 319 F.3d 119 (4th Cir. 2003) 11

Quix Snaxx, Inc. v. Sorensen, 710 So. 2d 152 (Fla. 3d DCA 1998) 15

TABLE OF AUTHORITIES – Continued

Page

Rosa v. Cutter Pontiac Buick GMC of Waipahu, Inc., 2004 WL 1543178 (9th Cir. 2004) 13

Singleton v. Foreman, 435 F.2d 962 (5th Cir. 1989) 15

Stewart v. Stearns & Culver Lumber Co., 48 So. 19 (Fla. 1908) 15

Stinson, Lyons, Gerlin & Bustamonte, P.A. v. Brickell Building 1 Holding Co., 923 F.2d 810 (11th Cir. 1991) 15

Streit v. Fireside Chrysler-Plymouth, Inc., 697 F.2d 193 (7th Cir. 1983) 11, 12

Terry v. Whitlock, 102 F. Supp.2d 661 (W.D. Va. 2000) 13

Vista Designs, Inc. v. Silverman, 774 So. 2d 884 (Fla. 4th DCA 2001) 15

Williams v. Public Finance Co., 598 F.2d 349 (5th Cir. 1979) 12

Young v. Progressive Southeastern Ins. Co., 753 So. 2d 80 (Fla. 2000) 15

RULES AND REGULATIONS

12 C.F.R. § 226.2(a)(13) 13, 14

12 C.F.R. §§ 226.4(d)(2), (3)(i) 3

15 U.S.C. § 1601 7

15 U.S.C. § 1601(a) 9

15 U.S.C. § 1605(c) 3

Federal Rule of Civil Procedure 12(b)(6) 7

Fla. Stat. §§ 501.201, et seq. 7

TABLE OF AUTHORITIES – Continued

Page

Fla. Stat. §§ 520.01, et seq. 7

Fla. Stat. §§ 672.201(1), (3)(b), (c) 16

Fla. Stat. § 672.204 16

Fla. Stat. § 672.607 16

OTHER AUTHORITIES

R. Stern, E. Gressman, S. Shapiro, K. Geller, *Supreme Court Practice* (8th ed. 2002) 10

A. Taub, *Focus on Auto Fraud, Crooked Car Dealers – Some Favorite Tricks*, 10 The Consumer Advocate at 4-5 (Oct.-Dec. 2004) 6

INTRODUCTION

There is no compelling reason for this Court to grant certiorari in this case. The sole reason asserted by Petitioner Bill Heard Chevrolet – Plant City ("Bill Heard") is that the Eleventh Circuit's decision conflicts with this Court's decision in *Ford Motor Credit Company v. Milhollin*, 444 U.S. 555 (1980). In fact, the two cases address different issues and are in no way in conflict. Although Bill Heard argues that the decision below is inconsistent with one principle stated in *Milhollin*, the Eleventh Circuit cited and properly applied that principle.

Moreover, there is no split of authority between the courts of appeals on the issue presented. The only two circuits that have ruled on it – the Fourth and Eleventh – have both agreed that a car buyer consummates a credit transaction when the buyer executes a credit contract with the seller/creditor, even if the contract purports to contain an unsatisfied condition precedent that the seller be able to later successfully assign the contract to a third-party lender on the same terms and conditions.

Finally, the Eleventh Circuit's decision is correct. Even where a credit contract expressly contains a condition precedent that the seller/creditor be able to successfully assign the contract to a third-party lender (and the credit contracts in this case did *not* contain such a condition), the buyer consummates his or her credit transaction, requiring that TILA disclosures must have already been given to the buyer, when the buyer signs the contract. This holding is supported by TILA, Regulation Z, and Florida contract law. In any event, it is undisputed that Bill Heard never gave all of the pertinent TILA disclosures to the buyer at *any* time – much less prior the buyer executing

the credit contracts. Thus, Respondent, Randall Bragg ("Bragg") stated a valid TILA claim.

STATEMENT

A. The Facts[1]

Bill Heard is licensed in Florida as a motor vehicle dealer and a motor vehicle retail installment seller. Mr. Bragg visited Bill Heard on September 28, 2001, and decided to purchase a new 2002 Chevrolet Silverado truck. He paid a $600 down payment and traded in his 1994 Ford Escort, valued by Bill Heard at $500. At that time, Mr. Bragg signed one of Bill Heard's standard purchase contracts ("Purchase Contract #1") and two of Bill Heard's standard Retail Installment Sale Contract Simple Finance Charge contracts ("RISC #1" and "RISC #2").[2] Bill Heard did not sign any of these three contracts.

Purchase Contract #1 listed the sales price of the truck as $19,253.34 plus charges for two property insurance products: $399.00 for a Silencer Alarm ("SAP") and $199 for Vehicle Theft Registration ("VTR"). Both of the RISCs also included $495 for insurance and debt cancellation coverage ("GAP"). Bill Heard included the charges for VTR, SAP and GAP in the cash price, which price was incorporated into the RISCs in the "amount financed." RE-38-6-8 & Exh. A2, A3.

---

[1] Except where citations are given, all procedural history and facts in this Statement come from the court of appeal's decision that is located in Petitioner's Appendix ("Pet. App.") A at 1a-14a and is reported at 374 F.3d 1060.

[2] *See* Appellant's Record Excerpts ("RE") RE-38 Exh. A1, A2, A3.

Under 15 U.S.C. § 1605(c) and 12 C.F.R. §§ 226.4(d)(2), (3)(i), Bill Heard was required to make certain disclosures concerning VTR, SAP and GAP.[3] However, nowhere on Purchase Contract #1, RISC #1, RISC #2, or on the SAP, VTR or GAP forms, did Bill Heard make all of the required disclosures.[4]

Bill Heard argued below and in its Petition that Bragg's credit transaction was a "conditional credit transaction." *See, e.g.*, Petition at i. The two RISCs on their faces are expressly unconditional, however. RE-A-2. They state in part: "By signing this contract you choose *to buy* the vehicle on credit under the terms on the front and back of this contract. You *agree to pay* Creditor-Seller (Bill Heard) . . . the Amount Financed and Finance Charge according to the payment schedule below." *Id.* (Emphasis added; hereafter all emphasis is added unless noted otherwise). Under a heading entitled "No Cooling Off Period," the RISCs state: "State law does not provide for a 'cooling off' or cancellation period for this sale. After *you sign this contract*, you may cancel it if the seller agrees or for legal cause." *Id.* Under a heading entitled "How This Contract Can Be Changed," the RISCs state: "This contract contains the entire agreement between you and us

[3] For VTR and SAP, the dealer must disclose that (1) this insurance coverage is not required; (2) if the insurance is purchased from the dealer – what the premium for the initial term is; and (3) if the term of insurance is less than the term of the transaction, what the term of insurance is. For GAP, the dealer must also make these three disclosures, and in addition, the consumer must sign or initial a written request for the insurance after receiving the disclosures.

[4] RE-38-6-10 & Exh. A2, A3, A10, A11, A12. Bill Heard made none of the three disclosures for VTR and SAP made only one of the three required disclosures for GAP on the GAP form (Exh. A10).

relating to this contract. Any change to this contract must be in writing and *we must sign it*." *Id.* Right above the block where Mr. Bragg signed them, the RISCs state: "You *agree* to the terms of this contract and confirm that you received a completely filled in copy when you signed it." *Id.*

On the same date that Mr. Bragg signed these contracts, he also signed a document entitled Bailment Agreement for Vehicle Spot Delivery ("Bailment Agreement"). *See* RE-38, Exh. A4; RE-A-4. That document permitted Mr. Bragg to take possession of the new truck on that date. The Bailment Agreement stated in part: "This Agreement is attached to and forms a part of that certain *sales* agreement between Dealer *listed below* and the undersigned buyer(s) and concerns the vehicle listed above." *Id.* Although the document listed the Silverado truck, it did not list the Dealer – Bill Heard, and it did not specifically refer to and describe Purchase Agreement #1, RISC #1 or RISC #2. And again, Bill Heard did not sign this document. *Id.* The Bailment Agreement purported to characterize the purchase and credit transaction between Mr. Bragg and Bill Heard as a rental agreement and contained this conditional language: "If Dealer is able to provide Buyer(s) with financing according to the terms of the *Sales* Agreement, said Agreement shall be binding upon Buyer(s) and enforceable by Dealer." *Id.*

Purchase Contract #1 also contained some conditional language stating that "the Seller agrees to sell the designated vehicle . . . provided however, the *designated financial institution* approves Purchaser's request for a loan . . ." RE-38, Exh. A1. Additionally, that contract stated, "Neither party hereto shall be bound to the other until terms of credit have been approved by both parties. . . ."

Neither Purchase Contract #1 nor the two RISCs, however, designated any financial institution. RE-38, Exh. A1 – A3.

On October 1, 2001, Bill Heard contacted Mr. Bragg and asked him to come back and sign additional documents. Mr. Bragg complied and signed two new Purchase Contracts and also two new RISCs ("RISC #3" and "RISC #4"). The financing terms in RISC #3 and RISC #4 were less favorable to Bragg than those in RISC #1 and RISC #2.[5] The two new purchase contracts listed the sales price of the truck at $18,993.00, one included a charge for an extended warranty of $990.00 but neither of the new purchase contracts contained charges for VTR or SAP. All four of these new contracts were backdated by Bill Heard to September 28, 2001, the date of Mr. Bragg's first visit; all four were signed by Mr. Bragg, but none of them were signed by Bill Heard on that date. On October 5, 2001, Bill Heard signed and assigned RISC #4 to Triad Financial Corporation who then issued payment to Bill Heard for $19,982.24. RISC #4 was the only contract between the parties Bill Heard ever signed.

The method by which Bill Heard sold and financed the truck to Mr. Bragg is known in the industry as "spot delivery," a method alleged in the amended complaint to be in violation of Florida's consumer protection laws and public policy. Taken from the allegations of Mr. Bragg's complaint, the Eleventh Circuit described the practice this way:

---

[5] *Compare* RISC #1 (APR 14.65%; finance charge $10,937.33; amount financed $21,158.91) and RISC #2 (APR 14.50%; finance charge $10,642.05; amount financed $21,158.91) *with* RISC #3 (APR 14.89%; finance charge $11,699.11; amount financed $22,176.18) and RISC #4 (APR 14.89%; finance charge $11,102.69; amount financed $21,046.09).

> Under "'spot delivery,'" the customer is presented with a Purchase Agreement, RISC and Bailment Agreement. Bill Heard then delivers the car to the customer "on the spot" on the same date that the customer signs the documents, and allows him or her to take the car without passage of title. The customer in return typically makes a cash deposit or trades in an existing vehicle as a down payment. Bragg contends that customers like him are "under the impression they have purchased a car under certain sales and finance terms." On occasion, Bill Heard will notify a customer that it was not able to secure the financing rates agreed to in the documents and ask them to sign new agreements with less favorable financing terms. If a new RISC is executed, the financing terms are calculated from the date of actual delivery of the vehicle to the customer. According to Bragg, Bill Heard never executes the original RISCs. Instead it uses the initial lower financing rates to entice the customers under a "'bait and switch'" scheme. Bragg also asserts that Bill Heard requires forfeiture of the down payment or trade-in vehicle if the customer refuses to accept the new financing terms.

Pet. App. A at 4a.[6]

B. The Proceedings Below

On November 30, 2001, Bragg filed this case against Bill Heard as a class action in state court and alleged five counts: (1) violations of the Truth and Lending Act, 15

---

[6] *See also* A. Taub, *Focus on Auto Fraud, Crooked Car Dealers – Some Favorite Tricks*, 10 The Consumer Advocate at 4-5 (Oct.-Dec. 2004).

U.S.C. § 1601, *et seq.* ("TILA"); (2) violations of Florida's Deceptive and Unfair Trade Practices Act, Fla. Stat. §§ 501.201, *et seq.*; (3) violations of Florida's Motor Vehicle Retail Sales Finance Act, Fla. Stat. §§ 520.01, *et seq.*; (4) unjust enrichment; and (5) declaratory and injunctive relief. The TILA claim alleged among other things that Bill Heard (1) failed to make required TILA disclosures prior to Mr. Bragg's consummation of credit terms; (2) failed to include in the finance charge the charges for insurance products sold in connection with his credit transaction, when it had failed to make required disclosures as a precondition to excluding such charges from the finance charge; and (3) failed to state clearly that the APRs in the first two RISCs were "estimates."

Bill Heard removed the case to federal court and moved to dismiss all of Mr. Bragg's claims under Federal Rule of Civil Procedure 12(b)(6). The district court granted the motion in part and denied it in part and granted Mr. Bragg leave to file an amended complaint. Concerning the TILA claim, the district court rejected Bill Heard's argument that the cost of the VTR insurance did not have to be included in the finance charge because it was also charged in cash transactions. RE-35 at 6-10. The Court agreed with Bill Heard's argument on the "estimates" theory of TILA violation, and it granted the motion to dismiss on that ground. *Id.* at 10-16.

Thereafter, Mr. Bragg filed an amended complaint.[7] Bill Heard again moved to dismiss the TILA claim and

[7] The amended complaint dropped the state law claims for unjust enrichment and declaratory and injunctive relief and added a state law claim for restitution of the amounts paid pursuant to an illegal contract, procured by Bill Heard in violation of state consumer protection

(Continued on following page)

asserted, for the first time, that Mr. Bragg had never consummated a credit transaction with it that violated TILA. In deciding the motion, the district court concluded that Bragg never consummated either of the first two RISCs because the Purchase Agreement and Bailment Agreement, which the court concluded it must read together with the unconditional RISCs as a single contract, contained an unsatisfied condition precedent – that neither party was bound until Bill Heard sold one of the RISCs to another lender. The district court dismissed Mr. Bragg's TILA claim with prejudice and declined to exercise supplemental jurisdiction over Bragg's state law claims. RE-77.

Mr. Bragg filed a motion for rehearing and, in response, the district court again held that the first two RISCs were never consummated, that no TILA violation occurred and that no claim could be stated. Pet. App. C at 22a-36a. Mr. Bragg appealed, and in a unanimous opinion, the Eleventh Circuit reversed. Pet. App. A.

To determine when Mr. Bragg consummated his credit transaction, the court first looked to Florida law. While it strongly implied that Florida law would resolve the question in Mr. Bragg's favor, it believed the answer under Florida law was unclear. Pet. App. A at 12a. The court then considered the consequences of the district court's reading of Florida law, TILA and Regulation Z, and stated that such a reading was contrary to TILA's central goal of providing " 'meaningful disclosure of credit terms so that the consumer will be able to compare more readily the

---

statutes and Florida's public policy where Bragg was not in pari delicto with Bill Heard.

various credit terms available to him.'" *Id.* at 13a (quoting 15 U.S.C. § 1601(a)). The court stated that under the district court's ruling, a creditor would not have to make the required disclosures to the consumer before he signed a credit contract so long as the disclosures were made at some point prior to the assignment of the loan. The Eleventh Circuit stated that disclosures made after the consumer signed a RISC "are likely to be of little or no value to that consumer" because it would undermine the ability of the consumer to weigh competing offers. *Id.* at 13a. In order to effectuate TILA's main purpose, the court held that even if a financing agreement contains a condition precedent that the seller/creditor be able to later assign a RISC, where the satisfaction of that condition "is within the exclusive control of the seller and third-party lender, consummation occurs when the consumer signs the contract." *Id.* at 13a-14a.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *FORD MOTOR CREDIT CO. v. MILHOLLIN.*

Bill Heard's sole basis for seeking certiorari review in this Court is its contention that the Eleventh Circuit's decision conflicts with this Court's decision in *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980). In fact, however, Bill Heard does not argue that the holding below conflicts with *Milhollin*, but that the opinion below did not follow *Milhollin's* direction that courts should defer to commentary construing Federal Reserve regulations. Not only is Bill Heard incorrect to denote this claimed inconsistency a conflict warranting this Court's review, but its

argument that the Eleventh Circuit did not follow this Court's direction is wrong as well.

In *Milhollin*, this Court considered whether TILA "requires that the existence of an acceleration clause always be disclosed on the face of a credit agreement." *Id.* at 557. In considering that question, the Court looked to Federal Reserve staff commentary and noted that, "unless demonstrably irrational, Federal Reserve Board staff opinions construing the [TILA] or Regulation should be dispositive." *Id.* at 565. The Court held that "TILA does not mandate a general rule of disclosure for acceleration clauses." *Id.* at 557.

First, the holding below plainly does not conflict with the holding of *Milhollin*. As the leading treatise on Supreme Court practice notes:

> [T]here must be a real or "intolerable" conflict on the *same matter of law* or fact, not merely an inconsistency . . . in the general principles utilized. . . . A genuine conflict, as opposed to a mere conflict in principle, arises when it may be said with confidence that two courts have decided the *same legal issue* in opposite ways, based on their *holdings* in different cases with very similar facts.

R. Stern, E. Gressman, S. Shapiro, K. Geller, *Supreme Court Practice* at 225, 226 (8th ed. 2002). Bill Heard does not argue that this case presents any such "genuine conflict."

Second, the Eleventh Circuit both cited and followed the statement in *Milhollin* on which Bill Heard's argument is based. Pet. App. A at 9a. Accordingly, to determine when Mr. Bragg became obligated on the credit transaction,

the court of appeals first looked to Florida law. Although it strongly implied that Florida law would resolve the question in favor of Mr. Bragg, the court stated that the answer under Florida law was not clear. *Id.* at 12a. The court then looked to the consequences of the district court's reading of Florida law and Regulation Z, and held that such a reading was "contrary to the central goal of TILA." *Id.* at 13a. Because a contrary result would "undermine" TILA, the court then held that Mr. Bragg consummated his credit transaction when he signed the contract. The court's approach was entirely consistent with this Court's direction in *Milhollin* and presents no basis for this Court's review.

II. THERE IS NO SPLIT OF AUTHORITY AMONG THE CIRUITS ON THE QUESTION PRESENTED.

Only two of the courts of appeals have directly ruled on the issue of when consummation of a credit contract occurs where the contract purportedly contains an unsatisfied condition precedent – the Eleventh Circuit in this case, and the Fourth Circuit in *Nigh v. Koons Buick Pontiac, GMC, Inc.*, 319 F.3d 119 (4th Cir. 2003), *rev'd on other grounds*, __ U.S. __ (Nov. 30, 2004). Those two circuits came to the same conclusion.

Consistent with these two decisions, the Seventh Circuit, in *Streit v. Fireside Chrysler-Plymouth, Inc.*, 697 F.2d 193 (7th Cir. 1983), although it affirmed a directed verdict for the dealer on another ground, disagreed with the district court's ruling that the buyer never consummated his credit transaction because he never paid the dealer the balance of the downpayment, and with the dealer's argument, (similar to Bill Heard's argument here),

that the credit transaction was not consummated because the dealer never assigned the credit contract to a third-party lender bank. The court held that the buyer did consummate the credit transaction for purposes of TILA:

> We . . . hold that the financing agreement was consummated here. The installment contract, which was between Streit and [the dealer], not Streit and the bank, established a credit obligation, as the language of the contract makes clear: "Buyer agrees to pay to Seller the above Total of Payments in 48 successive monthly installments."

Id. at 196.[8]

District courts have also recognized that consummation occurs when the buyer signs the RISC. *See* Pet. App. A at 10a (citing 5 district court opinions); *see also Martinez v. Rick Case Cars, Inc.*, 278 F. Supp.2d 1371 (S.D. Fla. 2003) (denying motion to dismiss TILA claim where dealer did not make disclosures before the *buyer* signed the contract); *Compton v. Alta Vista Motors, Inc.*, 121 F. Supp.2d 932 (W.D. Va. 2000) (dealer violated TILA by failing to list charge for GAP on RISC which was consummated *once buyer signed it* even though dealer made disclosure in later document); *Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F. Supp.2d 1087 (W.D. Mich. 2000) (buyers became obligated upon signing

---

[8] *Streit*, 697 F.2d 193 (following *Davis v. Werne*, 673 F.2d 866 (5th Cir. 1982) (transaction did not become unconsummated because the finance company refused to accept an assignment; post-consummation abandonment of credit contract has no effect upon creditor's liability under TILA), and citing *Dryden v. Lou Budke's Arrow Finance Co.*, 630 F. 641 (8th Cir. 1980) (failure to make disclosures not excused by ultimate unenforceability of credit contract under state law); *Williams v. Public Finance Co.*, 598 F.2d 349 (5th Cir. 1979) (same)).

RISC even though dealer claimed buyers not obligated until it found financing, *i.e.*, assigned RISC); *Daenzer v. Wayland Ford, Inc.*, 2002 WL 1050209 (W.D. Mich. May 7, 2002) (judgment for buyer because no dispute buyer did not receive TILA disclosures before signing RISC); *Terry v. Whitlock*, 102 F. Supp.2d 661 (W.D. Va. 2000) (consummation occurred when buyer signed credit contract, gave trade-in to dealer and took possession of financed car from dealer).[9]

III. THE DECISION BELOW IS CORRECT.

Finally, the decision below is correct. The Eleventh Circuit correctly cited the pertinent provisions of TILA, Regulation Z and the Official Staff Commentary relied on by Bill Heard, and it cited and applied *Milhollin* and the principle that courts should defer to Federal Reserve staff opinions when interpreting TILA and Regulation Z. Pet. App. A at 9a. The court held that consummation can occur even *if* the transaction is unfunded, meaning the RISC contains a condition precedent that the dealer be able to successfully assign the RISC to another lender for two reasons. First, it held that this result is "consistent with Regulation Z's *exclusive* reference to the *consumer's* commitment." Pet. App. A at 10a; *see* 12 C.F.R. § 226.2(a)(13) (consummation occurs at the "time a *consumer* becomes contractually obligated on a credit transaction"). Second, the court held, this result advances TILA's overarching

[9] In an unpublished opinion in *Rosa v. Cutter Pontiac Buick GMC of Waipahu, Inc.*, 2004 WL 1543178 (9th Cir. 2004), the Ninth Circuit affirmed a judgment on the pleadings for a dealer where the buyer never signed a RISC – only a conditional *purchase* contract – and thus no credit transaction had been formed.

purpose of consumer protection, while a contrary result thwarts that purpose. Pet. App. A at 13a. Under the district court's erroneous reading of Regulation Z and Florida law, the Eleventh Circuit stated that a seller would not have to make disclosures before the buyer signed the contract but only at some point before the loan was assigned. *Id.* But disclosures that are given after a buyer signs a RISC, the court held, would be of little or no value to the buyer because it would undermine the buyer's ability to weigh competing offers of credit terms. *Id.* The Eleventh Circuit's decision is consistent with TILA, Regulation Z, and the staff commentary addressing the point in time by which disclosures must be made.

In the end, Bill Heard's complaint is not with the degree of deference that the Eleventh Circuit afforded the staff commentary, but with TILA and Florida law. Although the court below stopped short of deciding the state law issues because only one reading of Florida law was consistent with TILA, Florida law supports the decision below.

First, the RISCs were unconditional on their faces and contained modification clauses providing that they were the entire agreement between the parties and any changes must be in writing signed by both parties. Giving effect to the modification clause as required by Florida law, the

unconditional RISCs should not be construed as conditional credit contracts by reading them together with two documents containing vague conditional language, neither of which was signed by Bill Heard.[10]

Second, under Florida law, the RISCs cannot be read together with the Purchase Contracts and Bailment Agreement as a single conditional contract. Florida law permits such a unification of multiple documents only when each of the documents have been signed by *both* parties.[11] Moreover, since the RISCs neither expressly referred to nor sufficiently described the Purchase Contracts and Bailment Agreement, and since these two documents did not refer to or describe the RISCs, the later documents cannot be interpreted as part of the RISCs. *Quix Snaxx*, 710 So. 2d at 153.

Third, the Purchase Agreements and the Bailment Agreement could not be used to make the RISCs conditional contracts because those first two documents were void ab initio and unenforceable since they were procured by Bill Heard in violation of Florida's consumer protection statutes and public policy, as alleged in the amended complaint under Florida's common law illegality doctrine.[12]

---

[10] *Stinson, Lyons, Gerlin & Bustamonte, P.A. v. Brickell Building 1 Holding Co.*, 923 F.2d 810, 813 (11th Cir. 1991) (under Florida law, every part of contract must be given effect).

[11] *Clayton v. Howard Johnson Franchise Systems, Inc.*, 954 F.2d 645, 648 (11th Cir. 1992); *Quix Snaxx, Inc. v. Sorensen*, 710 So. 2d 152, 153 (Fla. 3d DCA 1998).

[12] *Singleton v. Foreman*, 435 F.2d 962 (5th Cir. 1989); *Stewart v. Stearns & Culver Lumber Co.*, 48 So. 19 (Fla. 1908); *Young v. Progressive Southeastern Ins. Co.*, 753 So. 2d 80 (Fla. 2000); *Vista Designs, Inc. v. Silverman*, 774 So. 2d 884 (Fla. 4th DCA 2001).

Fourth, under five sections of Florida's version of the Uniform Commercial Code, Mr. Bragg was contractually obligated on the RISCs he executed, even though Bill Heard did not sign them, where Mr. Bragg made a down-payment and a trade in and accepted the truck, and through the conduct of the parties, including Bill Heard's admission in its first motion to dismiss that the first two RISCs were binding and enforceable contracts. *See* Fla. Stat. §§ 672.201(1), (3)(b), (c); 672.204; 672.607.

Finally, the language in the Purchase Agreement and Bailment Agreement (on which the district court relied to read a condition precedent into the RISCs) was ambiguous as a matter of law because it was susceptible to two or more reasonable interpretations and must therefore be construed against the drafter, Bill Heard.[13]

For all these reasons, under Florida law, Mr. Bragg became contractually obligated on the RISCs when he signed them, and thus stated a valid TILA claim for Bill Heard's failure to make the required disclosures concerning VTR, SAP and GAP to him prior to his execution of the RISCs.

---

[13] *Maccaferri Gabions, Inc. v. Dynateria Inc.*, 91 F. 3d 1431, 1439 (11th Cir. 1996); *Lambert v. The Berkley South Condominium Ass'n*, 680 So. 2d 588 (Fla. 4th DCA 1996); *Gorman v. Kelly*, 658 So. 2d 1049, 1052 (Fla. 4th DCA 1995).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. DANIEL CLARK
CLARK, CHARLTON & MARTINO, P.A.
3407 W. Kennedy Boulevard
Tampa, FL 33609
(813) 879-0700

KEITH EDWARD HOPE
(*Counsel of Record*)
THE HOPE LAW FIRM, P.A.
5614 Guava Street
Holmes Beach, FL 34217
(941) 779-0988

Counsel for Respondents